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December 8, 2004

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Ms. Dortch:

Eschelon Telecom, Inc., Grande Communications, Talk America Inc., and XO Communications, through their attorneys, respectfully submit this letter in the above-referenced proceedings in response to Qwest's eleventh-hour *ex parte* requesting that the Commission use a market share test to determine whether a network element should be unbundled in a particular market. The Commission must not give any weight to Qwest's last minute proposal, which Qwest filed just one day before the commencement of the Sunshine Period—and not found anywhere else in the record in this proceeding—thus foreclosing the opportunity for interested parties to evaluate and provide any meaningful comment in response to Qwest's proposal.¹ Affording any weight to Qwest's proposal despite the fact that carriers have been denied an adequate opportunity to respond is contrary to the letter and the spirit of the Administrative Procedure Act ("APA") and serves only to invite further judicial challenges. Qwest already has

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The arguments against affording any weight to Qwest's *ex parte* apply equally to Alaska Communications Systems's ("ACS") last-minute *ex parte* to the extent that ACS attempts to export its proposal outside of the state of Alaska. *See ACS ex parte* (Dec. 2004).

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sought the same relief through a petition for a declaratory ruling,² and may seek similar relief through that same procedural approach for other markets.

The Commission would be violating the letter and the spirit of the APA if it were to consider and act upon Qwest's eleventh hour proposal. Under the APA, with which the Commission must comply in adopting any rules in this proceeding, the Commission is required to provide advance notice of a proposed rulemaking, including an identification of the issues to be considered in that rulemaking.³ The APA also requires that all interested parties have a meaningful opportunity to comment on proposed regulations not only by the Commission but also by the commenters in this proceeding.⁴ Indeed, one of the primary reasons for the notice requirement is to ensure "fairness to affected parties."⁵

In this case, however, the parties did not have any notice—and certainly not sufficient time to evaluate and comment—of Qwest's market share proposal or that the Commission would evaluate Qwest's market share proposal in this proceeding. The Commission did not seek comment on a market share proposal in the *NPRM* in this proceeding.⁶ Nor did Qwest put its proposal on the record in either its comments or reply comments. Instead, Qwest purposefully waited eight weeks after the comment due date, and just one day before the beginning of the Sunshine Period, before making its proposal publicly known.⁷ Therefore, in

² See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (filed June 21, 2004).

³ 5 U.S.C. § 553(b).

⁴ 5 U.S.C. § 553(c) (stating, "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments..."); see also *MCI v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (stating that notice must be "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process" and quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).

⁵ *Sprint Corporation v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citing *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

⁶ *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 15 (rel. Aug. 20, 2004).

⁷ Critically, Qwest's filing was not available via the Commission's electronic filing system as of the filing of this *ex parte*, and the CLECs submitting this *ex parte* were required to obtain the *ex parte* through other means. If parties were not aware of Qwest's *ex parte* through informal means, then they would not have had any notice of the filing since it has not yet been posted on the Commission's website, and, therefore, have been denied an opportunity to comment on the proposal.

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this case, the parties did not have any advance notice that the Commission would consider the market share approach in this context. To avoid running afoul of the APA, interested parties must have a meaningful opportunity to participate; if they do not have that opportunity, such as in this case, then the Commission must not give any weight to the proposal.⁸

The Commission repeatedly has stressed the importance of timely filing all arguments to be considered in this proceeding, and it would be contrary to Commission precedent to give any weight to Qwest's proposal at this juncture. In the *NPRM*, the Commission highlighted the streamlined pleading cycle, and emphasized that all arguments to be considered in the proceeding must be put on the record in an efficient manner: "to minimize the burden and time associated with determining parties' positions, we require parties to make all substantive legal and policy arguments in their comments, reply comments, or *ex parte* filings, rather than only raising them in supporting materials."⁹ The Commission explicitly "warned" parties that the "requirements were put in place to ensure that the issues in this proceeding are fully and fairly presented within the severe constraints placed on the Commission by the necessity of formulating permanent rules quickly."¹⁰ Affording any weight to Qwest's *ex parte* would be contrary to the Commission's order and would serve only to give preferential treatment to Qwest in this proceeding.

In other contexts with constrained comment cycles, the Commission has rejected, or given no weight, to later filed materials. As one example, in the proceedings for in-region interLATA authority under section 271 of the Act, the Commission required applicants (the Bell Operating Companies ("BOCs")) to submit a complete application at the time of filing.¹¹ The Commission emphasized that the stringent application of the rule was necessary due to the short timeframe for review: "[b]ecause of the 90-day statutory review period, the section 271 review process is keenly dependent on...an applicant's submission of a complete application at the

⁸ See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981) (stating if "documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment...then both the structure and the spirit [of the Clean Air Act] would have been violated."); see also *Doe v. Rumsfeld*, --- F.Supp.2d ---, 2004 WL 2397332 (D.C.Cir. 2004) (stating that it "is clear that when an agency relies on studies or data after the comment period has ended, no meaningful commentary on such data is possible").

⁹ *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 15 (rel. Aug. 20, 2004).

¹⁰ *Id.*

¹¹ See *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 17 FCC Rcd 14670, 14672-73 (2001).

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commencement of a section 271 proceeding.”¹² Indeed, the Commission has rejected—or given no weight—to data filed outside of the complete as filed requirement.¹³ The Commission must hold Qwest to the same standards in this proceeding, given the stringent time constraints under which all parties are operating. It would be patently unfair and contrary to the APA and the Commission’s orders for the Commission to afford any weight to Qwest’s proposal filed just one day before the Sunshine Period begins.

Furthermore, Qwest has alternative avenues for pursuing the relief it seeks. Qwest already has filed a Petition for Forbearance from the requirements of section 251(c) and section 271(c)(2)(B)(i-vi) and (xiv) to its provision of telecommunications services in the Omaha, Nebraska Metropolitan Statistical Area (“MSA”).¹⁴ The requested relief is an extremely fact-specific inquiry that will vary from market-to-market. The appropriate course of action would be for Qwest to file a Petition for Forbearance, as it already has done, in the markets in which it requests the Commission forbear from enforcing the Act.

¹² *Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 3309, 3320 (1997).

¹³ *See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20571-72 (stating, “[w]e hold that it is appropriate to accord new factual evidence no weight for several reasons. First, as we have stated before, we find that allowing a BOC to supplement its application with new information at any time during the proceeding would be ‘unfair to interested third parties seeking to comment on a fixed record triggered by the date that a section 271 application is filed.’”).

¹⁴ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (June 21, 2004).

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The Commission must not give any weight to Qwest's eleventh hour filing, to which parties have not had a meaningful opportunity to respond. Please contact me at (202) 955-9600 if you have any questions regarding this filing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. Mutschelknaus', with a long horizontal stroke extending to the right.

Brad E. Mutschelknaus

cc: Christopher Libertelli
Scott Bergmann
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
Jeff Carlisle
Pam Arluk
Russ Hanser